

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JACOB MONTOYA)	
Claimant)	
VS.)	
)	
MONFORT, INC.)	Docket Nos. 168,342
Respondent)	& 169,906
AND)	
)	
CITY INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant appeals from a July 9, 1996 Award by Administrative Law Judge Jon L. Frobish. The Appeals Board heard oral argument on January 14, 1997.

APPEARANCES

Claimant appeared by his attorney, Stanley R. Ausemus of Emporia, Kansas. Respondent and its insurance carrier appeared by their attorney, Alisa A. Nickel of Dodge City, Kansas.

RECORD AND STIPULATIONS

The Appeals Board considered the record and adopts the stipulations listed in the Award. However, the Award fails to list the August 3, 1994 report of Dr. Anthony Pollock which was issued pursuant to an Order for independent medical examination entered by Administrative Law Judge Thomas F. Richardson on April 7, 1994. The parties agreed that the record should include said report and the Administrative Law Judge refers to same in the body of his award under the Findings of Fact. Accordingly, the Appeals Board also considered Dr. Pollock's report as a part of the record in this case.

ISSUES

The Administrative Law Judge denied claimant an award of compensation in Docket No. 168,342. Claimant did not argue for a reversal or otherwise raise a specific issue with regard to that separately docketed claim. Therefore, the Appeals Board affirms the findings, conclusions and order of the Administrative Law Judge in Docket No. 168,342.

In Docket No. 169,906 the sole issue raised on appeal is the nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSION OF LAW

Having reviewed the entire record and having considered the briefs and arguments of the parties, the Appeals Board finds that the Award of the Administrative Law Judge should be affirmed in both docketed claims.

The findings of fact by the Administrative Law Judge contained one misstatement of the evidence. The Administrative Law Judge correctly notes that Dr. C. Reiff Brown provided claimant with a functional impairment rating of 5 percent to the body as a whole and that Dr. Pollock agreed with Dr. Brown's rating. However, the Administrative Law Judge went on to state that "Dr. Pollock provided the claimant with a 15% impairment rating to the body as a whole." What the Administrative Law Judge apparently meant to say was that Dr. Pollock also provided claimant with a 5 percent impairment rating to the body as a whole. Dr. Pollock, in his Court-ordered independent medical examination report dated August 3, 1994, states:

"Partial impairments seem to vary 15% to 5% of the whole body. I would be more inclined to accept Dr. Reiff Brown's analysis, as this was based on some formal testing, hopefully removing any testing bias. In the absence of any obvious objective pathology other than the mild degenerative disease of his spine, I can see no reason why this man should not continue to work."

The Appeals Board understands the above-quoted portion of Dr. Pollock's report to mean that he is adopting Dr. Brown's 5 percent functional impairment rating. This is probably what the Administrative Law Judge also understood Dr. Pollock's report to say, and the 15 percent figure in the Award was thus a misstatement or transcriptional error. In any case, the Appeals Board agrees with and adopts the Administrative Law Judge's finding of a 5 percent functional impairment and his award of a 5 percent permanent partial disability based thereon.

Unlike the Administrative Law Judge, the Appeals Board did consider the opinions of Dr. Edward Prostic with respect to claimant's impairment of function. Dr. Prostic provided a functional impairment rating of 15 percent but admitted he did not rely exclusively on the AMA Guides to the Evaluation of Permanent Impairment, Third Edition

(Revised). The Administrative Law Judge ruled that Dr. Prostic's testimony, therefore, was not competent medical evidence. However, the version of K.S.A. 44-510e(a) that requires the percentage of functional impairment "as established by competent medical evidence and based on the third edition, revised, of the American Medical Association Guidelines for the Evaluation of Physical Impairment [sic]" was not effective until July 1, 1993. The stipulated accident date in Docket No. 169,906 is September 1, 1991. Claimant's disability is therefore to be determined pursuant to K.S.A. 1991 Supp. 44-510e(a). The statute relevant to the determination of functional impairment in this case contains no reference to the AMA Guides. Accordingly, the Appeals Board finds Dr. Prostic's testimony to be competent medical evidence.

Except as above noted, the findings of fact and conclusions of law as enumerated in the Award by the Administrative Law Judge are found to be accurate and appropriate and are hereby adopted by the Appeals Board as its own as if specifically set forth herein. The Appeals Board specifically finds that claimant has failed to sustain his burden of proving that he is entitled to a work disability in Docket No. 169,906. Respondent provided claimant with an accommodated job which was within his restrictions and which paid him a wage comparable to that which he was earning at the time of his injury. Claimant's refusal to continue performing that job was not justified and was not based upon his physical abilities. Even though he attempted the accommodated job, it appears as though claimant was attempting to take advantage of the workers compensation system. The public policy considerations announced in Foult v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995) apply to this case.

It is always difficult to try to determine what is on an injured worker's mind when he refuses accommodated work that appears to be within the restrictions recommended by the health care providers. In this case, claimant's symptoms and complaints appear to be out of proportion to his injury. Furthermore, claimant's refusal to return to work after he was given the opportunity to do so appeared to be based more upon claimant's concerns about the pending litigation than due to his physical limitations or the potential for re-injury. Accordingly, the wage claimant would be earning in the accommodated job is imputed to him and the presumption of no work disability contained in K.S.A. 1991 Supp. 44-510e(a) applies. The Award by the Administrative Law Judge should be affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish dated July 9, 1996, in Docket No. 168,342 should be, and is hereby affirmed in all respects, and the orders contained in the Award are hereby adopted by the Appeals Board as its own.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish dated July 9, 1996, in Docket

No. 169,906 should be, and is hereby affirmed in all respects, and the orders contained in the Award are hereby adopted by the Appeals Board as its own.

IT IS SO ORDERED.

Dated this ____ day of January 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stanley R. Ausemus, Emporia, KS
Alisa A. Nickel, Dodge City, KS
Kenneth S. Johnson, Administrative Law Judge
Philip S. Harness, Director